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**Commission to Reimagine the Future of New York's Courts
2022 HEARINGS ON PANDEMIC PRACTICES**

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Good morning. Thank you for inviting me to testify at the hearing today. My name is Kristin Brown and I am the President and CEO of Empire Justice Center. I am also a member of the Chief Judge's Permanent Commission on Access to Justice and a New York Legal Services Coalition Board member. Empire Justice is a legal services organization that addresses a wide range of poverty law issues affecting low-income people across the state of New York. Our advocates provide support and training to legal services and other community-based organizations, represent thousands of New Yorkers annually in individual cases and class actions, undertake policy research and analysis, and engage in legislative and administrative advocacy.

You will hear a great deal during today's hearings about the impact the pandemic has had on the operation of New York's courts. Our focus is as a public interest law firm, where we provide direct representation of individuals within the court system – in diverse practice areas such as foreclosure, landlord-tenant disputes, and civil rights litigation and much more. Like many providers, we shifted the delivery of our legal services during the height of the pandemic in order to meet the needs of our clients by changing the way we connected; creating help lines, using social media, meeting outdoors, and developing resources that were regularly updated with the dizzying changes in process and rules. As the courts began the process of reopening, we adapted to the new normal of online court appearances and the increased use of technology by the judiciary, and supported our clients as they faced this new reality – often through the digital divide. Throughout all of this, we witnessed firsthand the ways in which the “post-pandemic” court system can play a role in closing the justice gap for people in low-income communities while providing greater access to the courts in some instances, as long as the needs of the diverse array of litigants and their representatives are taken into account.

From my work with the Permanent Commission, it is clear that both court leadership and providers of civil legal services agree that a permanent technology and culture shift has occurred. We are at a unique point in history and it truly is the time to reimagine the future of New York's Courts. We appreciate this opportunity to provide input toward creating new policies and practices, always with a goal of ensuring that the experience and needs of the individual court user are kept at the forefront.

Today, I want to highlight three key issues/areas for improvement as we see them since courts have reopened:

1. the need for statewide consistency and development of best practices;
2. the barriers created by mandating notarization; and
3. the urgent need for language justice in the courts

I. Statewide Consistency Would Better Ensure More Equitable Access to the Courts Across New York

One issue we've identified with the move to online court appearances during the pandemic is a lack of uniformity and consistency across jurisdictions, resulting in different treatment and inequitable access to justice. Litigants coming to state court should receive equal or comparable treatment regardless of where they live. Courts had a tall task to figure systems out as they moved along through incredibly difficult circumstances, whether it was a small rural court with a limited technology budget, or an urban court hearing thousands of cases each month. If New York's state courts move forward to permanently adopt measures employed during the pandemic it is critical that the Office of Court Administration establish a uniform set of standards and best practices for all state courts to follow.

In doing this, a set of standards should be established with the primarily goal of ensuring that all litigants – including people with limited access to technology, people with disabilities, people with limited English proficiency, and so on – are afforded full and fair access to the courts. This means that there is no single solution that will work in all circumstances. Rather, courts must follow offer a variety of alternatives using a hybrid model, with a focus on affording as much choice to litigants and the representatives as possible. Courts should address this issue by giving participants meaningful choice, with an option to switch to an in-person proceeding if a participant discovers that remote access to the court is not serving their interests adequately.

Standards should be set regarding the technology to be used and how it is used. The Joint Technology Committee for the Conference of State Court Administrators, the National Association for Court Management, and the National Center for State Courts have developed recommendations for remote hearings.¹ Every technological choice, including the choice not to use technology at all, is likely to influence the way litigants are perceived. Statewide, consistent, evidence-based metrics should be developed to standardize the technology used, including recommendations for camera positioning, muting, control of background noise, volume, and so forth.

To ensure that low-income and pro se litigants have equal access to justice, we must give consideration to who bears the costs of remote access to the courts. The digital divide is persistent and disparately affects many marginalized communities and rural New Yorkers. While nonprofit legal service providers like Empire Justice Center are sometimes able to help bridge the digital divide for our clients who are best served by a remote appearance but lack the technology to do so effectively. However, the cost of closing the digital divide should not be borne by providers whose limited resources must go toward services. The Permanent Commission has developed recommendations for best practices and programs that help to close the divide. Investments in court and community-based kiosks, technology borrowing, and digital navigator programs should be invested in systematically in

¹ JOINT TECH. COMM., MANAGING EVIDENCE FOR VIRTUAL HEARINGS 1 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf [<https://perma.cc/MC69-CSSK>].

every part of the state. Until then, consideration must be given to the differing degree of access provided to litigants proceeding remotely who have access to a computer versus a cell phone, two monitors versus one, a safe and quiet space to participate and so forth. No person's experience as a witness or litigant should be degraded because they could not afford the equipment necessary to fully participate in proceedings.

Standards for ensuring due process is upheld should be developed. For instance, telephonic or video calls must include a means for the lawyer to have discussions privately with their client during the hearing or meeting. And where technology fails, or where a litigant is unable to fully participate in a hearing because of technology problems, there must be a standard for adjournments or attempts to immediately resolve the technology problem presented.

New York State has made significant investments in the civil legal services delivery network, and we have made great strides to increase access to counsel for defendants over the years, including representation of tenants facing eviction. As access expands, standards should be set to ensure defendants are notified and provided access to legal services, when appropriate. Prior to the pandemic, legal services providers connected to litigants in the courthouse. Where hearings are remote, those opportunities to offer our services are more limited or nonexistent. Working with legal service providers, the judiciary should set standards for making sure litigants are aware of free or low-cost legal services available in their communities before they are forced to appear pro se, similar to the process used in foreclosure matters.

In addition to uniform standards, best practices should be identified and set forth and courts statewide should be strongly encouraged to follow. For example, in the context of mandatory settlement conferences in residential foreclosure cases involving home loans, legal services providers have discussed basic best practices for video conferences with homeowner advocates. Best practices would include things like clear identification orally and in writing of all parties involved at the outset, slowing down the pace of the conference and taking pauses, requiring parties to identify themselves each time they talk (this would also be helpful for the court reporter), clearly setting forth the purpose of the hearing or meeting at the beginning and telling the homeowner to have a paper and pencil ready to take notes, and clearly providing a summary at the end and including a two minute pause at the end for questions.

The judiciary need not resolve these problems alone. We believe that the best way to develop a full set of standards and best practices would be to engage the courts and practitioners across the state, create stakeholder groups, and utilize the expertise available in our law schools and other interested organizations to develop specific best practices to be disseminated across the state.

II. Improve Access to Justice by Allowing Affirmations Rather Than Requiring Notarization of Court Documents.

The requirement that legal documents be notarized is a significant and unnecessary barrier to access to the courts and to justice for many low-income people and should be eliminated. Often it's the typical access issues – clients do not have transportation or child care to get to a notary and may have to take unpaid time off from work to find one. In rural communities, notaries are few and far between and because of the nature of smaller communities – everyone knowing everyone – confidentiality is also an issue. Petitioners often need to go to a bank or to the court itself to find a notary. In Black communities, banks, the most reliable place to find a notary, are significantly harder to access. According to a report published before the pandemic, in majority-white counties, there are an average of 41 financial institution for every 100,000 people compared with 27 in non-white majority neighborhoods². Organizations that serve low-income communities often address this challenge by making sure they have staff who are notaries, placing an additional burden on not-for-profit providers who are often overburdened themselves. Thus, eliminating the requirement will provide administrative relief to legal services providers as well.

Notarized verifications are required in matrimonial proceedings, and a recent case muddies the waters as to whether they are required for family court petitions. The Third Department recently held that a visitation petition that was not verified could not be dismissed on that basis [*Matter of Shawn MM v. Jasmine LL*, 180 AD 3d 1186 (Third Dep't 2020)]. The Court pointed out that the verification requirement was not required by either CPLR 3020 or Article 6 of the Family Court Act. However, the official forms on the New York Uniform Court System (UCS) website contain verification blocks with jurats for a notary's signature. See: <http://ww2.nycourts.gov/forms/familycourt/custodyvisitation.shtml> (last accessed 6/1/22). In light of the *Shawn NN* decision, the Office of Court Administration should issue guidance as to whether family court petitions must be notarized, and either revise the forms on the UCS website to delete the notarization block, or at the very least indicate that notarization is optional. The UCS website is used by both pro se litigants and their attorneys and making such a change would increase access to justice.

A notarized verification is required to file an Article 78 petition. When the benefits of people who receive public assistance, SNAP, Medicaid or HEAP are discontinued or reduced by their local social services district, this adverse action can be challenged at an administrative fair hearing. But if the hearing decision is not favorable and the person wants to appeal, typically, an article 78 petition is the only way to appeal an adverse hearing decision. CPLR 7804(d). There are simply not enough attorneys to provide representation in all such cases, and pro se petitioners face a barrier to accessing a notary within a short four-month statute of limitations.

For the last two years, an Office of Court Administration (OCA) Program bill has been advanced, but not introduced in either the Assembly or the Senate. This bill would amend CPLR 2106 to allow litigants in civil cases to swear to a statement under penalty of perjury without having to have a document notarized. This would be consistent with 28 USC § 1746, the federal law requiring unsworn

² McKinsey and Company, The Economic Impact of Closing the Racial Wealth Gap, <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>, August, 2019

declarations under penalty of perjury, rather than sworn notarized statements. Currently, CPLR 2106 permits only attorneys, physicians, osteopaths, and dentists to file affirmations, and only if they are not a party to an action. We strongly support this OCA Program bill, which would not only increase access to justice, but also, provide clarification that notarization is not required for family court petitions.

We are aware of the recent amendment to § 135-c of the Executive Law, which permits remote notarization, but in our view, this does not solve the access to justice issue. This law fails to recognize that many low-income families lack the necessary technology, tools and digital skills to make remote notarization effective.

III. Language Justice

Language Justice³ is an evolving framework based on the notion of respecting every individual's fundamental language right—to be able to communicate, understand, and be understood in the language in which they prefer and feel most articulate and powerful. Rejecting the notion of the supremacy of one language, it recognizes that language can be a tool of oppression, and as well as an important part of exercising autonomy and of advancing racial and social justice.

Access to competent and impartial interpreters is a critical need that is fundamental to the basic tenets of fairness and justice. Unfortunately, there is a nationwide shortage of certified interpreters, including American Sign Language (ASL) certified interpreters, causing delays in access to the courts or forcing litigants to go without interpretation, even if they do not feel comfortable doing so. This shortage of interpreters is particularly acute for sign language interpreters for people who do not understand ASL, including Black American Sign Language and Chinese Sign Language. Although some legal services providers, including Empire Justice Center, have bilingual staff, during complex court proceedings, the absence of certified interpreters can cause more harm than good. Prioritizing the training and hiring of interpreters is of critical importance. Court certificate exams for non-Spanish interpreters are only offered once a year in NYS, limiting opportunities for potential candidates as the process may take a year or more. Additionally, certified interpreters are not offered specialized training in how to offer interpretation for remote proceedings and this should be addressed.

In both remote and in-person proceedings, courts review the need for an interpreter in each case. People with limited English proficiency and users of sign language might not be aware of their rights regarding language access in the courts. All litigants, including those participating remotely, must be made aware of the availability of interpretation services for proceedings. Court personnel, including judges, should be offered training to help them ascertain when a litigant or witness may need an interpreter. This is critical because we find that some of our clients are able to engage in a casual conversation comfortably in English but are not able to understand the complex concepts addressed during court proceedings without an interpreter. Especially during remote proceedings, were a lack of understanding on the part of a litigant or witness may not be apparent, courts should screen for the need for interpretation services.

³ [American Bar Association on Language Justice](#)

Courts should develop consistent procedures and best practices to be applied before proceedings start when an interpreter is being used, including during remote proceedings, so everyone is clear on the process. For example, many times, court proceedings move faster than an interpreter can competently perform their job. Pauses are needed to provide an opportunity for the interpreter to speak. In remote proceedings, where gestures cannot be monitored as easily, it is important for the court to manage the need for those pauses. Further, all persons participating in a proceeding must speak at a reasonable pace when using interpreters to afford the interpreter the opportunity to be as precise as possible. And in remote proceedings, whether by telephone or video, speakers should be required to identify themselves, so the litigants and court are clear about who is speaking, and confusion and misinterpretation is avoided.

High quality training is essential for the courts and members of the bar to ensure meaningful access for persons using interpreters or when using translated documents, including how to do so in a remote environment. For instance, all court personnel should be trained on how to effectively work with an interpreter during remote proceedings, including highlighting (if on Zoom) the non-English speaking litigant or witness, not the interpreter, to reduce the difficulty of making credibility determinations.

Appearing remotely in court may save some time (and money), but as described above, special considerations need to be given during remote hearings when one or more persons are using an interpreter. Furthermore, a person using an interpreter is more likely to pay more for their case than a person not using an interpreter due to rescheduling, attorney time, work time off due to the shortage.

Lastly, it is important to note that using an interpreter goes beyond translation. Effective interpretation must also include cultural competency.

In a legal context, language justice is a commitment to ensuring individuals marginalized based on their national origin, ethnic identification, and language, including sign language, are not denied equal access to services, remedies, and justice overall. The fundamental rights of tens of millions of individuals who do not use English as their dominant language are at stake and could be lost without such access to justice.

IV. Recommendations/conclusion

Our courts have confronted tremendous challenges over the last two years and have demonstrated the ability to be flexible and innovative. I would like to leave you with our three recommendations for the Commission as you move forward in this important task of ensuring access to justice for all members of our community:

1. Develop a comprehensive set of standards and best practices to ensure that technology does not become a barrier to equal access and due process in the court system
2. Reduce the requirements for notarized verifications in court pleadings

3. Keep language justice at the forefront of the Commission’s ongoing work